United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-6129

United States Court of Appeals

FOR THE SECOND CIRCUIT

B/S

RONALD H. WHELAN, JOHN J. BRODERICK, EDWARD J. BURNS, EDWARD J. GASPARTICH, WILLIAM F. LYNCH, ANTHONY J. ROSS, HENRY O. HANRAHAN, RICHARD LIETO, FRANCIS B. MCCOMB, FRANK B. JONES, BENEDETTO RUNCO, GEORGE S. BRITO, JOHN E. CONDON, JOHN E. HARKINS, JOHN B. JONES, WILLIAM F. KEHOE, RICHARD D. LANG, TIMOTEO MONGE, WALTER R. PRICE, ALFRED J. SEEVERS, GUNNAR O. STRAND, JOHN A. MUELLER, MARC LANG, BENEDETTO LEO, HARATIO N. AGGARD, JOHN S. FORTE, ERICH GEHM, JOSEPH G. GLENNON, CONSTANTINO L. LEONE, SABATO A. MESSINA, FRANK J. MONDELLO, HENRY G. NIELSEN, HAROLD M. OLIVER, SIMON R. ROSENTHAL, JOSEPH J. SCHULTZ, JOHN R. SHARPE, THOMAS SOLOMETO, JR., ANTONIO SPINELLI, MARIO RUNCO, FREDERICK H. MALLETT, ROBERT M. DEGARLAND, HENRY BUTLER, HERMAN SEIBEL, JAMES MULVANEY, and RICHARD DARE,

Plaintiffs-Appellants,

—against—

CLAUDE S. BRINEGAR, Secretary of the Department of Transportation, ADMIRAL CHESTER R. BENDER, Commandant of the U. S. Coast Guard, and ROBERT E. HAMPTON, JAYNE SPAIN and L. J. ANDOLSEK, constituting the members of the U. S. Civil Service Commission,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANTS

MARKOWITZ & GLANSTEIN
Attorneys for Plaintiffs-Appellants
50 Broadway
New York, N. Y. 10004
943-6148

Of Counsel,
JOEL C. GLANSTEIN
ELEANOR GLANSTEIN

3

TABLE OF CONTENTS

TABLE OF CASES

Cases:

PAGE

United States Court of Appeals

FOR THE SECOND CIRCUIT

RONALD H. WHELAN, JOHN J. BRODERICK, EDWARD J. BURNS, EDWARD J. GASPARTICH, WILLIAM F. LYNCH, ANTHONY J. ROSS, HENRY O. HANRAHAN, RICHARD LIETO, FRANCIS B. MCCOMB, FRANK B. JONES, BENEDETTO RUNCO, GEORGE S. BRITO, JOHN E. CONDON, JOHN E. HARKINS, JOHN B. JONES, WILLIAM F. KEHOE, RICHARD L. LANG, TIMOTEO MONGE, WALTER R. PRICE, ALFRED J. SEEVERS, GUNNAR O. STRAND, JOHN A. MUELLER, MARC LANG, BENEDETTO LEO, HARATIO N. AGGARD, JOHN S. FORTE, ERICH GEHM, JOSEPH G. GLENNON, CONSTANTINO L. LEONE, SABATO A. MESSINA, FRANK J. MONDELLO, HENRY G. NIELSEN, HAROLD M. OLIVER, SIMON R. ROSENTHAL, JOSEPH J. SCHULTZ, JOHN H. SHARPE, THOMAS SOLOMETO, JR., ANTONIO SPINELLI, MARIO RUNCO, FREDERICK H. MALLETT, ROBERT M. DEGARLAND, HENRY BUTLER, HERMAN SEIBEL, JAMES MULVANEY, and RICHARD DARE,

Plaintiffs-Appellants,

—against—

CLAUDE S. BRINEGAR, Secretary of the Department of Transportation, ADMIRAL CHESTER R. BENDER, Commandant of the U. S. Coast Guard, and ROBERT E. HAMPTON, JAYNE SPAIN and L. J. ANDOLSEK, constituting the members of the U. S. Civil Service Commission,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANTS

Introduction

Plaintiff-Appellants wish to correct certain basic erroneous factual assertions made by appellees throughout their brief before turning to a discussion of the specific points of argument in appellees' brief.

Erroneous Factual Assertions by the Appellees:

1. Appellees' Erroneous Assertion:

   "In essence, the plaintiffs want 'parity' with their brethren who are employed on the Staten Island Ferry, the necessary result being that their pay would ebb and flow with the New York City's financial condition and the City's bargaining position with the union representing the Staten Island Ferry employees." Appellees' Brief, p. 3.

   Plaintiff's Reply:

   This statement is incorrect in that there are two unions representing the employees on the Staten Island Ferry boats. The Marine Engineers Beneficial Association represents the licensed officers and Local 333, United Marine Division represents the unlicensed crew members. 31a, 271a-272a, 313a-314a. In addition any possibility of "ebb and flow" of pay is limited by the fact that Staten Island Ferry personnel wages are tied into New York private harbor settlements. (112a-113a)

2. Appellees' Erroneous Assertion:

   "It was no longer practicable to implement the 1966 Treasury Wage Board decision by reference to the Staten Island contracts." Appellees' Brief, p. 8.

Plaintiffs' Reply:

Practicability is not the test under the statutory mandate of 5 U.S.C. §5348(a), rather the test is one of public interest. If it was in the public interest to use the Staten Island Ferry contracts as the point of reference for the Governors Island Ferry employees, even if that meant more money for the plaintiffs then some other formula that DOT might devise, the Treasury Wage Board decision must be adhered to, even if no longer as practicable as appellees would wish. The United States Court of Claims has interpreted 5 U.S.C. §5348 (a) to mean that public interest is not to be used as a justification by an agency for refusing to follow a procedure that is difficult to implement. Cf. *Blaha* v. *United States,* 511 F. 2d 1165, 1170-1 Ct. Cl. 1975).

3. Appellees' Erroneous Assertion:

"By contrast, plaintiffs claim that a Governors Island ferryboat master should have received $6.36 an hour rather than $5.29 per hour or $7.03 per hour." Appellees' Brief, p. 9.

Plaintiffs' Reply:

Appellees have mistakenly claimed that plaintiffs demand the exact wages of a Staten Island Ferry captain given in their example. Plaintiffs in this suit have claimed parity of increase provided in the Treasury Wage Board decision of 1966, not parity of wages. (185a, 203a, 204a). The Treasury Wage Board recognized the fact that there were some differences between the Governors Island ferries and the Staten Island ferries so the Board did not recommend adop-

tion of the exact wage rate. However, it did order, and plaintiffs claim, parity of increase with the Staten Island Ferry as the point of reference for the wage increases of the Governors Island Ferry personnel (246a-248a).

4. Appellees' Erroneous Assertion:

"DOT's final decision was that a Governors Island ferry master should receive a 24.9% increase in two increments retroactive to August, 1968 making a master's hourly wage rate $6.36 per hour. (133a) This decision was reached as a result of a wage survey and did not represent 'parity' with the Staten Island employees. Appellees' Brief, pp. 9, 10.

Plaintiffs' Reply:

This increase in wages did represent parity of increase with Staten Island Ferry employees. 150a-154a. There is also evidence in the record to show that the wage increases were granted as a result of the readoption of the Treasury Wage Board decision (251a-254a).

Having noted the erroneous factual assertions of Appellees, we turn to the infirmities in Appellees' legal arguments.

POINT I

The doctrine of sovereign immunity does not bar recovery of back pay in a case arising under 5 U.S.C. §5348 (a) (Supp. 1976).

The doctrine of sovereign immunity is contrary to the modern concept that individuals should have a remedy for every legal wrong, even if it is committed by the government. *Hartke* v. *Federal Aviation Administration,* 369 F. Supp. 741, 745 (E.D.N.Y. 1973). The Supreme Court has long followed a liberal attitude with regard to waivers of sovereign immunity where a federal agency is concerned. See *Federal Housing Administration* v. *Burr,* 309 U.S. 242 (1940); *Kiefer & Kiefer* v. *Reconstruction Finance Corp.,* 306 U.S. 381 (1939).

The suit by the Governors Island ferryboat workers seeking back pay from July, 1967 to August, 1968 and from July, 1970 to the present does not, as suggested by Appellees (Appellees' Brief, pp. 15-18), come within the parameters of the recent Supreme Court decision in *United States* v. *Testan,* —— U.S. ——, 44 U.S.L.W. 4245 (Mar. 2, 1976).

The *Testan* case dealt with employees seeking back pay and reclassification on a claim of erroneous classification. The three statutes analyzed by the Supreme Court in *Testan*: the Tucker Act, 28 U.S.C. §1491 as amended; the Classification Act, 5 U.S.C. §5101 et seq.; and the Back Pay Act, 5 U.S.C. §5596 are not at issue in this case. The factual situation in the case at bar is clearly distinguishable from *Testan.*

The jurisdictional statutes in this case are 28 U.S.C. §1331, §1346(a) (2) and Section 10 of the Administrative Procedure Act (hereinafter "APA") (5 U.S.C. §702). While the Supreme Court held that the Tucker Act was merely jurisdictional and cannot act as a waiver of sovereign immunity, *Duarte* v. *United States*, cited by appellees, —— F. 2d —— (2d Cir., Mar. 26, 1976) (No. 75-C1021), does not hold that all the possible bases for jurisdiction in the case at bar come within the *Testan* rationale. In *Duarte*, as the Court noted, jurisdiction is based on the Tucker Act, 28 U.S.C. §1346(a) (2) which gives the district court original jurisdiction concurrent with the Court of Claims in certain situations. The *Duarte* Court's consideration of the *Testan* analysis of the Tucker Act, 28 U.S.C. §1491, in actions brought in the district courts under 28 U.S.C. §1346 (a) (2) deals with a virtually identical provision, but does not analyze the applicability of 28 U.S.C. §1331 or 5 U.S.C. §702 pursuant to which this case has also been brought.

These statutes, when invoked and applied as a basis for jurisdiction in conjunction with 5 U.S.C. §5348(a), create a waiver of sovereign immunity on the part of the government so as to enable the plaintiffs to recover back pay.

When Congress created the Department of Transportation ("DOT") and transferred the functions of the Coast Guard, which included the Governors Island Ferry employees, it made actions of the DOT subject to the provisions of the APA. 49 U.S.C. §1655(h). This has been held to constitute a waiver of sovereign immunity of the Coast Guard when its action is subject to review, as here, under the APA. *State of Delaware* v. *Bender*, 370 F. Supp. 1193, 1196-7 (1974) (D.C. Del.). 5 U.S.C. §5348 (a) carries this

concept of waiver of sovereign immunity one step further to allow the recovery for back pay sought in this case.*

This statute can be compared to the waiver of sovereign immunity found in 37 U.S.C. §202(1), *Selman* v. *United States,* 204 Ct. Cl. 675, 498 F. 2d 1354 (Ct. Cl. 1974) which the Supreme Court said was clearly distinguishable from its analysis in *Testan.* The pay claims in *Selman* were based on a mandatory provision which entitled the plaintiffs to back pay.

The statute in *Selman* which the Supreme Court held to be a mandatory provision makes no explicit provision for back pay.**

The statute in the case at bar, 5 U.S.C. §5348 (a) which mandates that the pay of officers and crew of vessels be fixed and adjusted in accordance with prevailing rates and practices in the maritime industry is analogous to the statute in *Selman* that the Supreme Court deemed mandatory.

The only rational interpretation which can be given to 5 U.S.C. §5348 (a) is that which requires mandatory compensation by the Federal Government for the damage sus-

---

* 5 U.S.C. §5348 (a) provides as follows: "a. Except as provided by subsections (b) and (c) of this section, the pay of officers and members of crews of vessels excepted from Chapter 51 of this title by Section 5102 (c) (8) of this title shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry."

** 37 U.S.C. §202 (1) provides that: "Unless appointed to a higher grade under another provision of law, an officer of the Navy or Marine Corps serving as Ass't Judge Advocate of the Navy is entitled to the basic pay of rear admiral (lower half) or brigadier general, as appropriate."

tained, which in this case is loss of back pay for the appellants. *United States* v. *Testan, supra,* 44 U.S.L.W. at 4248.

Back pay has been awarded in a 5 U.S.C. §5348 (a) Court of Claims case. *Blaha* v. *United States,* 511 F. 2d 1165 (Ct. Cl. 1975). As the Court awarded back pay without analysis of the issue of sovereign immunity, appellees argue that the *Blaha* Court "apparently relied on the 'legal entitlement' theory which was specifically rejected by the Supreme Court." Appellees' Brief, p. 18.

The Blaha Court did not need to rely on a "legal entitlement" theory since 5 U.S.C. §5348 (a) can itself be relied on as mandating back pay and appellees' contention in this regard is purely conjectural.

Even if the Court decides 5 U.S.C. §5348 (a) only confers a right to back pay it should still assume jurisdiction and decide the case on its merits. *Ralston Steel Corporation* v. *United States,* 340 F. 2d 663, 667-8 (Ct. Cl. 1965); *Eastport Steamship Corp.* v. *U.S.,* 372 F. 2d 1002, 1009 (Ct. Cl. 1967).

Thus the Court is not barred by the doctrine of sovereign immunity from awarding back pay in this case since the principles enunciated in *Testan* v. *U.S., supra* do not apply to this action under 5 U.S.C. §5348 (a).

POINT II

The change by appellees in the method of determining appellants' wages was illegal, failed to fulfill procedural requirements and resulted in appellants receiving less money in wages during the period July 1, 1967-June 30, 1970 than they would have received under the 1966 Treasury Wage Board decision which appellees erroneously failed to follow.

Appellees concede that the 1966 Treasury Wage Board decision was a "rule" as defined in 5 U.S.C. §551 (4). (Appellees' Brief, p. 20). Thus it came within the "savings provision" of DOT ACT, Pub. L. 89-670, §12.* Since the Wage Board decision was a rule, any change by DOT of the rule must meet the requirements of rule-making under 5 U.S.C. §553 including Section 553 (b) that "general notice of proposed rulemaking . . . be published in the Federal Register . . ." unless it can be shown that the proposed rule falls within the exemption of 5 U.S.C. §553 (a) 2.

The cases the Government relies on in its brief (Appellees' Brief, p. 22) as falling within this exemption are clearly distinguishable from the case at bar. *Rainbow Valley Citrus* v. *Federal Crop Insurance Corp.*, 506 F. 2d 467, 468-69 (9th Cir. 1974) falls within the public contracts exception to rule making. The Governors Island ferry em-

---

* Appellees argue that because appellants challenge the validity of the method used by DOT to change the existing rule promulgated by the Treasury Wage Board, that the Wage Board determination itself was not valid if it did not meet the criteria appellants deem necessary for a change. Such an argument is without merit. How the Treasury Board rule was promulgated is not at issue here. The government concedes it is a rule, thus it falls within DOT's savings clause.

ployees had no contract with the Department of Transportation. There is also no relationship between a rule promulgated by DOT to determine the plaintiffs wages pursuant to a statutory mandate and a determination that the rule making exemption applies to rent increases approved by the Federal Housing Administration for tenants in a federally assisted housing project. *Langerin* v. *Chenango Court, Inc.*, 447 F. 2d 296 (2nd Cir. 1971). The setting of wages pursuant to the statutory mandate of 5 U.S.C. §5348 (a) does not fall within any of the exemptions from rule-making.

Appellees rely on cases (Appellees Brief, p. 22) dealing with employee discipline and classification. *U.S.* v. *Professional Air Traffic Controllers Organization*, 438 F. 2d 79 (2d Cir. 1970), *cert. denied*, 402 U.S. 975 (1971); *Kavazanjian* v. *United States Immigration & Naturalization Service*, 399 F. Supp. 339 (S.D.N.Y.) *aff'd.* Mem on the Opinion of the District Court, —— F. 2d —— (2d Cir. April 21, 1976), but these do not bring the rule-making required in this situation within any statutory exemption. Thus DOT also had to meet the statutory requirement of 5 U.S.C. §552 (a) (1) that required publication of rules promulgated in accordance with 5 U.S.C. §553.

There is no conflict between requiring DOT to follow procedural requirements of the APA when they want to change an existing rule and DOT's mandate under 5 U.S.C. §5348 (a) as appellees suggest. (Appellees Brief, p. 23). DOT has the right to change a rule if it has a rational basis for that change provided it follows the proper procedure. The way to protect against arbitrary use of discretionary power is through administrative standards and safeguards, i.e., the rule-making power. See, K. Davis, Administrative Law Treatise, §6.05 at 147 (Supp. 1972).

Appellees' contention (Appellees' Brief, pp. 23, 24) that plaintiffs had actual notice that DOT was not going to follow the 1966 Treasury Wage Board decision is incorrect. There is evidence in the record that DOT had readopted the Treasury Wage Board decision (251-254a) and that was the basis for the 25% increase over pre-1967 wages agreed to in December, 1969. To the extent that there is conflict in the record between this notice to the Governors Island Ferry employees that the Treasury Wage Board decision had been readopted and the evidence dealing with exploring methods of wage revision (70a and 194a) the plaintiffs could only be placed in a state of confusion. The appellants could not know what method would be utilized to determine their wages until they were informed that the Treasury Wage Board decision had been readopted (251a-254a). Thus appellees were not relieved of the publication requirements of 5 U.S.C. §552(a).

Appellee's analysis of the exemption requirements of 5 U.S.C. §552(b) (2) ignores the fact that the criteria set forth by the Sentate Report during its discussion on the interpretation of the exemption does not differentiate between 5 U.S.C. §552(a)1, the publication provision and 5 U.S.C. §552(a)2, the availability of information provision. The standard the appellees urge upon the Court for the exemption under 5 U.S.C. §552(b)(2), i.e., the Court's determination of the effect of non-publication on the general public is an attempt to widen the exemption in a manner that runs entirely contrary to legislative intent. K. Davis, Administrative Law Treatise, §3A.15 at 79 (Supp. 1972).

Cafeteria & Restaurant Workers Union, Local 473 v. *McElroy,* 284 F. 2d 173, 179 (D.C. Cir.) *aff'd* on other grounds, 367 U.S. 886 (1960), relied on by appellees (Ap-

pellees Brief, p. 25) to support their interpretation of 5 U.S.C. §552(b) 2 is a case under the Freedom of Information Act, 60 Stat. 237 (1946) in effect before the liberalizing provisions of the 1966 amendments (80 Stat. 378 (1966), as amended by 81 Stat. 54 (1967), 5 U.S.C. §551-9). *McElroy* came within an exemption for functions of the United States requiring secrecy and dealt with the operation of an agency concerned with secrecy in defense matters.

Appellees contend (Appellees Brief, pp. 25, 26) that the public effect is not a proper criteria for determining what rules should be exempt under 5 U.S.C. §——(b)(2). The public's right to information under the revised 5 U.S.C. §552 is to be given the broadest possible interpretation limited only by narrowly interpreted exemptions to that section. Publication of any change by DOT in its use of the Treasury Wage Board determination would have clarified all of the confusion as to what type of methods were being used to fix wages. The slight expense involved in publishing this material in the Federal Register is no justification for not making this information public.

Appellees are clearly erroneous in their contention (Appellees Brief, pp. 23-28) that plaintiffs received more money in wages during the period July 1, 1967-June 30, 1970 than they would have received under the 1966 Treasury Wage Board decision. Appellees speak of cumulative wages, while the statute, 5 U.S.C. §5348 (a), provides that pay be fixed and adjusted in accordance with "prevailing rates and practices in the maritime industry." The utilization of a cumulative wages theory to satisfy the requirements of 5 U.S.C. §5348 (a) is contrary to the statutory mandate of payment of *"prevailing rates and practices"*.

Appellees comparison of the effects of wages awarded the Governors Island Ferry employees and the Staten Island hourly rate schedule (Appellees' Brief, p. 27) are misleading because they do not take into consideration the fact that a Staten Island Ferry captain in the example given only worked a 32 hour week so his effective weekly rate was $7.05 not $5.29 an hour. Thus a Governors Island master receiving $5.09 an hour from August 25, 1968 and $6.36 an hour from August 25, 1968-June 30, 1970 for a 40 hour week (App. 133e) could in no way be deemed to be receiving a higher effective hourly rate than a Staten Island captain.

Appellees' contention that the Treasury Wage Board decision contemplated a simple transfer (Appellees' Brief, pp. 27, 28) of cents per hour wage increases from the basic hourly rate schedule fixed in the Staten Island Ferry contracts is erroneous in that it ignores the fact that the Treasury Department Wage Board decision recognized its obligation to fulfill the statutory mandate of 5 U.S.C. §5348 (a) which speaks of "prevailing rates and practices." In order to fulfill this mandate the phrase "cents per hour increases" should be interpreted to mean that the effective hourly rate is to be transferred to the Governors Island Ferry employees wage scale. Thus to the extent that DOT failed to follow the Treasury Wage Board formula, it resulted in a loss of wages to the plaintiffs.

For these reasons as well as those advanced by appellants in their initial brief this Court should find and conclude that the change by appellees in the method of determining appellants' wages was illegal. This Court should further find that the appellees failed to fulfill procedural requirements and this resulted in appellants receiving less money

in wages during the period July 1, 1967 to June 30, 1970 than appellants would have received under the 1966 Treasury Wage Board decision which appellees illegally failed to follow.

POINT III

DOT has failed to establish a valid reason for its change from the use of the Staten Island Ferry wage schedule as the standard for setting Governors Island Ferry employees' rates of pay.

The record reveals that administrative convenience is the reason set forth by DOT as a rational for its switch to the use of a wage survey (156a-160a). Appellants do not question DOT's discretion in fixing and adjusting pay as long as its methods follow proper procedure and have some valid basis. The record further demonstrates that a survey of rates of pay and working practices in the harbor in July, 1969 revealed there was no prevailing rate in the maritime industry. (326a). The use of a method to determine plaintiffs wages that could not establish a prevailing rate is clearly arbitrary and failed to fufill the statutory mandate of 5 U.S.C. §5348 (a).

Contrary to appellees' contention (Appellees' Brief, p. 29) the record shows that the Staten Island Ferry rates reflected the prevailing rates in the New York harbor area for the maritime industry (247a). Plaintiffs have never claimed that no differences existed between Governors Island and Staten Island Ferry boats. However, the plaintiffs maintain, and the Treasury Board decision reflects the conclusion, that they were identical enough to be used as the point of reference to set wage increases according to the

mandate of 5 U.S.C. §5348 (a) (247a). Appellees have never been able to demonstrate a valid reason to change this decision.

The case at bar is clearly distinguishable from the situation in *Daniels* v. *United States,* 407 F. 2d 1345 (Ct. Cl. 1969). In *Daniels* the Secretary of the Navy applied a nationwide formula for fixing wages to a local area, while in this case DOT is attempting to change an existing method of fixing wages that fulfilled the mandate of 5 U.S.C. §5348 (a) for a new method without any valid reason for the change. This action by DOT was clearly arbitrary.

POINT IV

This Court has jurisdiction over the appeal from the judgment for defendants in its entirety since there is only one claim or cause of action in the complaint herein, that is, a claim for back wages and a pay adjustment for the future under 5 U.S.C. §5348(a).

Defendants advance the contention for the first time on appeal that the plaintiffs' complaint allegedly presents two distinct claims and that jurisdiction to hear the appeal of the second of these claims should lie in the Temporary Emergency Court of Appeals under 12 U.S.C.A. §1904 (Supp. 1976). (Appellee's Brief, pp. 33, 34).

Scrutiny of the Complaint filed and served by prior counsel (1a, 2a) for appellants in the United States District Court for the Southern District of New York demonstrates that the assertion of appellees that there are two distinct claims is incorrect.

The complaint which was filed on June 23, 1973 (2a) seeks a judgment from the District Court that each of the plaintiffs be granted

> " . . . the prevailing and going rate of wages for the comparable jobs in the New York City Staten Island Ferry retroactive to July 1, 1967 and that a pay adjustment is due them for the future . . . " (11a)

The District Court treated plaintiffs' complaint accordingly as one for " . . . back wages which they claim to have been improperly denied them, and a pay adjustment for the future." (203a)

Under 12 U.S.C. §1904:

> " . . . the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder "

This action was and is simply not a case or controversy arising under 12 U.S.C. §1904 (the Economic Stabilization Act of 1970) or the regulations or orders issued thereunder, but rather an action arising under 5 U.S.C. §5348(a) seeking retroactive and future pay adjustments in accordance with the prevailing rates and practices in the maritime industry.

The complaint here reveals that it seeks retroactive and future pay adjustments under the mandatory language of 5 U.S.C. §5348 regardless of the interdiction of the Economic Stabilization Act of 1970 or the regulations or orders promulgated pursuant thereto. There is only one claim or cause of action contained therein (4a-11a).

Therefore, appellees assertion that 12 U.S.C. §1904 applies and that there is a necessity to thereby resort to the Temporary Emergency Court of Appeals (TECA) is erroneous and misplaced.

The contention of appellees is also contrary to the traditional rule that a single claim or cause of action should not be split. As the Seventh Circuit noted in *Commonwealth Insurance Company of New York, et al.* v. *O'Henry Tent & Awning Co.*, 273 F. 2d 163, 165 (7th Cir. 1951):

> "Piecemeal litigation of a single cause of action, possibly leading to several judgments with executions levied upon each of them, is contrary to the policy of the Federal Courts because it interferes with the orderly administration of justice."

Moreover, the actions of the Civil Service Commission herein (214a-230a) did not attain the level of regulations or orders under U.S.C. §1904. Thus, there is no basis for appeal to the Temporary Emergency Court of Appeals. This lawsuit does not arise or exist by virtue of the Economic Stabilization Act of 1970 or the regulations or orders issued thereunder, but rather the failure of the defendants-appellees to adhere to 5 U.S.C. §5348.

Assuming, solely *arguendo,* this Court adopts the position of the appellees (Appellees' Brief, pp. 33, 34) that appellate review of the District Court approval of the decisions of the Civil Service Commission in 1972 and 1973 under E.O. 11639 (206a, 207a) is within the sole and exclusive jurisdiction of the Temporary Emergency Court of Appeals, there is ample authority for this Court to order a transfer of that portion of this appeal to the Temporary Emergency Court of Appeals under the doctrine of pen-

dent jurisdiction, while deciding or holding in abeyance for subsequent decision, the substantive issues subject to review by this Court that are independent and severable from those reserved for consideration solely by the Temporary Emergency Court of Appeals. *M. Spiegel & Sons Oil Corp.* v. *B. P. Oil Corp. and Standard Oil Company (SOHIO)*, —— F. 2d ——, No. 74-2079 (2d Cir. March 9, 1976), citing *Municipal Electric Utility Assn.* v. *FPC*, 485 F. 2d 967, 970 (D.C. Cir. 1973) and *Municipal Intervenors Group* v. *FPC*, 473 F. 2d 84 (D.C. Cir. 1972). See *Connecticut Mutual Group* v. *Federal Power Commission*, 498 F. 2d 993, 997, 998 (D.C. Cir. 1974).

In *United States* v. *Cooper*, 482 F. 2d 1393, 1397, 1398 (TECA 1973), the TECA approved such a procedure *in civil cases* such as the instant case. The procedure of retention and transfer is also permissible under *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966) and 28 U.S.C. §2106 if, indeed, such a transfer is deemed appropriate.

The record does not, however, justify a finding by this court that there are any issues for the TECA to resolve. This contention of the appellees should be rejected and a decision on the entire appeal should be rendered by this court.

POINT V

The Civil Service Commission's 1972 and 1973 decisions denying DOT's request for exemption from the 5.5% wage increase guidelines may be set aside if they were arbitrary and capricious and an abuse of its discretion.

The standard applicable to judicial review of the Civil Service Commission's decisions is not just limited to the substantial evidence test suggested by appellees in their brief (Appellees' Brief, p. 35). While the statutory criteria for review appear to be limited to orders which are either in excess of authority of the agency or based upon findings which are not supported by substantial evidence, the Temporary Emergency Court of Appeals has concluded that "the power of the court to correct arbitrary action is implicit in Section 211(d)". *Tasty Baking Company* v. *Cost of Living Council,* 395 F. Supp. 1367, 1371 (D.C. Pa. 1975).

The burden is on litigants who challenge regulations and orders of economic stabilization agencies to show that such regulations and orders* are arbitrary and capricious. *Tasty Baking Company, supra,* 1381. Thus substantial evidence is not the only criteria by which actions of the Civil Service Commission are to be judged. Actions taken under the 1970 Economic Stabilization Act have been deemed subject to the general judicial review provisions of 5 U.S.C. §§701-706. *Amalgamated Meat Cutters & Butcher Workers* v. *Connolly,* 337 F. Supp. 737, 761 (D.C., D.C. 1971). Even if there is a general exclusion of stabilization functions

---

* Appellants do not concede that the actions of the Civil Service Commission herein rose to the level of an order or regulation. Therefore, their actions are subject to all the criteria in the review provisions of the APA.

from the operation of the APA with certain exceptions related primarily to issuing regulations, the court's power to correct arbitrary action is implicit in Section 211(d) (1) of the Economic Stabilization Act Amendments of 1971, 12 U.S.C. §1904 (Supp. 1976). *Associated General Contractors of America, Inc. Oklahoma Chapter—Builders Division* v. *Laborers Int'l Union of North America, Local 612*, 476 F. 2d 1388, 1400-01 (Temp. Emerg. C.A. 1973).

Appellants have demonstrated in their brief that the Civil Service Commission was arbitrary in not following the recommendation of DOT.

CONCLUSION

The judgment and order entered below should be reversed and the plaintiffs should be awarded back pay from July, 1967 to August, 1968 and from July, 1970 to the present and an adjustment in their pay rates for the future to place them in parity with increases received by the Staten Island Ferry employees.

Respectfully submitted,

MARKOWITZ & GLANSTEIN
Office and P.O. Address
50 Broadway, Suite 3100
New York, N. Y. 10004
(212) 943-6148

Of Counsel:

JOEL C. GLANSTEIN
ELEANOR GLANSTEIN

Receipt of ~~[illegible]~~ (2) Copies of the within
acknowledged this 10 day of MAY 1970

Robert B Fiske Jr

5/10/70

GROSBY-LODER PRESS, INC., 95 Morton St., New York, N. Y. 10014 BE 3-2336
(76-510—51472)